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No. 82-1256

IN THE

Supreme Court of the United States

October Term, 1982

DENNIS LYNCH, Individually and as Mayor of the City of Pawtucket, RICHARD A. MUMFORD, Individually and as Finance Director for the City of Pawtucket, and GUY DUFAULT, Individually and as Director of Department of Parks and Recreation of The City of Pawtucket, and the CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER and AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Samuel Rabinove
The American Jewish Committee
165 East 56th Street
New York, New York 10022
Attorney for Amici Curiae

Of Counsel:

Jed S. Rakoff
Ellen B. Cohn

Andrea S. Klausner
The American Jewish Committee

Question Presented

Whether the display of a city-owned Creche in a city-sponsored Christmas celebration violates the Establishment Clause of the First Amendment to the United States Constitution.

Statement of Interest

The American Jewish Committee (AJC) and the National Council of Churches of Christ in the U.S.A., as *amici curiae*, respectfully submit this brief supporting affirmance of the decision below.

The American Jewish Committee, a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. We believe this goal can best be accomplished by helping to preserve the constitutional and civil rights of all Americans. Specifically, AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. We deem any breach in the wall separating Church and State as jeopardizing the political and religious freedoms which the wall was intended to protect. We submit this brief because we believe that a city-sponsored display of a city-owned Creche breaches government neutrality towards religion, in violation of the Establishment Clause of the First Amendment. The Creche, which depicts the birth of Jesus as the birth of a divinity, is unmistakably and unalterably religious. The clear sponsorship by the State of a particular religious doctrine represents government advancement of a particu-

lar religion and tends to entangle the government in promulgation of one religious doctrine over another, in violation of the First Amendment. We would feel the same with regard to a city-sponsored display of a city-owned menorah or any other religious symbol. The First Amendment is equally contravened by government sponsorship of any or all religions.

The National Council of the Churches of Christ in the U.S.A. is the cooperative agency of thirty-one national religious bodies in the United States having an aggregate membership of over 40,000,000. The Council does not presume to speak for all of those adherents but for its Governing Board, a body of some 280 members appointed by the several member denominations in proportion to their size and their support of the Council. As long ago as 1959, that body adopted a policy statement opposing the "Christian amendment" proposal (which would have inserted in the U.S. Constitution the assertion that "this is a Christian nation") in terms that are equally applicable to the acts of any state or municipality that would endorse or appear to endorse the view that Christianity or Christians enjoy or appear to enjoy some special privileged or proprietary role or rank with respect to governmental favor or sponsorship:

> To declare the United States a Christian nation in the churchman's sense of "Christian" is to assert less of truth than of pretension. . . . It is perilous, even sacrilegious, to turn to the political forum for practical determination of the public meaning of the great word "Christian." The church cannot share this word, central and peculiar to its character, with the nation-state.
>
> Previous attempts to maintain "Christian states," in earlier centuries as well as in our own, have been

> fraught with great problems and have failed in disillusion. They have frequently denied general liberty, and religious liberty in particular, to all who did not belong to the dominant body of Christians. In the American scene of today, [such a claim] would tend to weaken the rights of citizens and others who are not Christians, to lessen respect for their distinctive concerns, and to accentuate divisions within the body politic.

In the view of *amicus* National Council of Churches, the principal offense of the Nativity shrine owned, erected and illuminated by the City of Pawtucket as part of its Christmas display is not just that it degrades and secularizes a sacred symbol of Christianity, though it does tend to do that, but that it represents either a presumptuous sponsorship by government of that religion and its symbols or an equally presumptuous identification by Christians of their religious traditions with the institutions of government (or both), in any case an affront to persons of other religious persuasions or none—who are not less citizens because of that, and no less participants in and beneficiaries of municipal activities than Christians are, yet who are told by the symbolic usages complained of—more clearly than by words—that "this is a *Christian* town (state) (nation), and if you don't like it, that's too bad!"

This affront to non-Christian citizens is not only unjust, but no real boon to Christianity. Earning it the well-deserved resentment of non-Christians, such a display does not greatly enhance the piety of Christians, while at the same time trivializing their holy symbols. The insistence upon "keeping Christ in Christmas" by means of *state action* is predicated upon, and arrogantly expresses,

the conviction that the majority rules—and is entitled to rule—in matters of religion as in secular matters. That assumption is consonant with the European tradition of mere religious *toleration*, from which the Pilgrims and many others of our forebears fled; it is not consonant with the condition of full religious *freedom* which they erected here upon the adventurous foundation of the First Amendment, by which all citizens are equally citizens irrespective of their religious commitments, and no citizens are to be rendered "second class" because they are in a *religious* minority while the religious majority enjoys a seeming espousal of *its* religious emblems by the agencies of the state.

At the same time, *amicus* National Council of Churches is distressed by what may seem to be a disposition of courts and public officials to overcorrect for excesses of this type by the banishment of religion from public life altogether. The privatization, marginalization and sequestration of religious activity, interests, symbolism and discourse is something that *amicus* is determined to resist. Religion has been, is, and must continue to be a vital, vigorous and legitimate element in American public life. But that should be effected, not by *state action*, but by *citizen* action. There are many ways in which citizens, individually and in voluntary private groups of their own choosing, can express their religious views, commitments, symbols and aspirations without employing or seeking to employ the machinery of the State for *their* free exercise of religion.

At the Christmas season, for instance, it would be entirely appropriate for Christian organizations to erect Nativity shrines on their own private property adjacent to

the park in Pawtucket or even in the (private) park itself *at their own expense and by their own efforts.* It might even be permissible for them by private action to place a Creche at Christmas on the town "common"—if there is one—in the same sense that religious meetings can be carried on by private initiative in a public park or other public forum subject only to reasonable regulations of time, place or manner (*Hague* v. *CIO,* 307 U.S. 496 (1939)), or that student religious meetings can be held in the "limited public forum" provided by a state university on the same terms as student non-religious meetings (*Widmar* v. *Vincent,* 454 U.S. 263 (1981)). This distinction between government and society, between state action and private collective action in the public (but non-governmental) arena is essential to preserve the true free exercise of religion without its establishment, and *amicus* National Council of Churches urges the Court to extend and apply that distinction, already emerging in *Widmar,* to the instant case.

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This brief is submitted with the consent of the parties.

Statement of the Case

The facts of the case are set forth in the briefs of the parties hereto and in the opinion of the District Court reported at 525 F. Supp. 1150 (D.R.I. 1981), and thus need not be repeated here. Although petitioners, in addition to arguing the merits, argued below that respondent municipal taxpayers lacked standing to prosecute this action,[1] in their brief to this Court petitioners have abandoned any such argument and now raise solely the question of whether municipal sponsorship of a Nativity Creche violates the Establishment Clause. We submit this question can only be answered in the affirmative.

Summary of Argument

A Creche is a fundamentally religious symbol representing religious doctrine central to Christianity. It cannot be viewed simply as a secular symbol of the Christmas season. Municipal ownership and sponsorship of such a central religious doctrine thus offends the Establishment Clause of the First Amendment, which mandates a complete and unequivocal separation between religion and govern-

1. Federal courts have traditionally accorded standing to municipal taxpayers but not to federal taxpayers. *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). An exception from the latter prohibition was created in *Flast* v. *Cohen*, 392 U.S. 83 (1968) but in turn was narrowly construed in the recent decision of *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982). Petitioners' attempt below to read into the *Valley Forge* limitation on the exceptional case where there exists federal taxpayers standing some more general limitation on the unexceptional case where there exists municipal taxpayers standing was lucidly disposed of by the Court of Appeals below in its discussion at 691 F.2d 1029, 1030-32 (1st Cir. 1982).

ment and a wholesome neutrality towards various sects and denominations. That such municipal activity is unconstitutional is manifest, whether the Court applies the "strict scrutiny" test of *Larson* v. *Valente* or the tripartite test of *Lemon* v. *Kurtzman*. The Establishment Clause forbids every form of public aid or support for religion, whether aiding one religion, aiding all religions or preferring one religion over another. It is this separation between religion and government which has secured and maintained religious liberty for citizens of all denominations and of no denomination.

ARGUMENT

Governmental Sponsorship of a Nativity Creche Violates the Establishment Clause.

A. A Nativity Creche Is a Totally Religious Representation; Its Placement Among More Secular Symbols in this Case Did Not Deprive It of this Essentially Religious Character.

The Creche in this case is simply a large-scale version of the standard Nativity Creche frequently erected at Christmas-time in front of churches and on lawns of devout Christians. Its sole and obvious content is the depiction, in adorational terms, of the birth of a divinity in the form of the infant Jesus. It is hard to think of a doctrine that is more quintessentially religious in nature than that embodied in the Creche. The doctrine of the birth of Jesus is not only central to Christianity but also serves, both historically and theologically, to separate Christianity from other religions. Thus, petitioners' suggestion that this

Court in effect ignore the sole overt message of the Creche, and ignore its historical and theological significance, is to ask this Court to ignore the obvious, and ignore the religious sensibilities of both Christians and Jews alike, by pretending that a manifestly doctrinal picture-statement is no more religious than a tree, a star, or a Santa Claus. As Circuit Judge Bownes stated in his concurring opinion below, "To view the Creche as only one of the many symbols of the Christmas holiday season is to denigrate its religious significance and misinterpret the historical background of Christmas." (691 F.2d at 1037).

Even petitioners admit that "[o]f all the Christmas symbols, the Creche alone retains some religious significance in a religious setting. . . ." (Petitioners' Brief at page 20). Nevertheless, they claim—and this is the entire thrust of their argument to this Court—that "in the context of the conventional Christmas display, even the Creche is still primarily a [secular] symbol of the Christmas season." (*Id.*). This view is fallacious, for several reasons.

First, petitioners are unable to point to any substantial evidence that the Creche is in any meaningful respect simply a secular symbol of the Christmas season, let alone that it is "primarily" a secular symbol. Indeed, after considerable hearings, the District Court in this case rejected, as factually unfounded, any contention that the Creche directly partook of any such secular symbolism. Moreover, the District Court, in findings which were expressly adopted by the Court of Appeals, determined that if any secular symbolism could be attributed to the Creche at all, such "independent, secular meaning . . . is subordinate to,

and indeed flows from . . . [its] fundamentally religious significance. . . ." (525 F. Supp. at 1167, quoted at 691 F.2d at 1032).

Furthermore, such findings are amply confirmed by common sense and everyday experience; for it is a commonplace observation that, while many Christians (and even some non-Christians) place colored lights, stars, trees, and other ornaments on their windows and lawns during the Christmas season, those who erect Creches are almost invariably those who wish to emphasize the religious and sectarian aspects of Christmas.[2] After all, Christmas as a religious (as opposed to secular) celebration commemorates the birth of Jesus as Christ, the Son of God. By depicting this very event—depicting it, moreover, in strictly religious terms, with the Christ-Child being worshipped as God by kings and shepherds alike—the Creche is inextricably, inescapably symbolic of the religious view of Christmas. Indeed, it is difficult to imagine a more direct representation of the religious view of Christmas than the Creche.

Second, given this strong doctrinal overlay, the Creche does not become secularized and devoid of its religious import simply by being placed in proximity with other symbols of Christmas that are secular in nature. While "context"—on which petitioners place so much stress—is not without some influence upon the way in which an object is

2. See *Goldstein* v. *Fire Department of the Village of Suffern,* 559 F. Supp. 1389 (S.D.N.Y. 1983), holding that the erection of a sign reading "Keep Christ in Christmas" on the front of a municipal firehouse violates the Establishment Clause, since the sign referred to the "Christian theory of Christmas" and "created the obvious impression that defendants either were promoting or approving of the theological origins of Christmas." (*Id.* at 1391).

perceived, it nonetheless remains true that an orange cannot be transformed into an apple simply by being placed in a bushel basket instead of a crate. Unlike an inherently ambiguous symbol like a star or a tree, a Creche—which on its face conveys a specific religious message and doctrine—cannot readily be secularized simply by being placed near some secular object (let alone the ambiguous objects that formed the rest of the display in this case).

In this respect, it is also well to recall the District Court's observation that:

> Christmas remains a major spiritual feast day for most sects of Christians. It has not lost its religious significance; rather, it has gained a secular significance. Janus-like, it is one holiday with two distinct and very different faces. (525 F. Supp. at 1163).

Given this two-fold nature of Christmas, there is no reason to suppose that a person who visits those portions of a display that carry depictions associated with the secular face of Christmas will automatically impart some notion of secularity to the portion of the display portraying religious dogma. On the contrary, it is more reasonable to assume that the observer will believe that he has now passed from the portions of the display celebrating secular Christmas to the portion of the display celebrating religious Christmas.

Finally, if "context" is somehow to be the talisman for assessing whether a Creche is secular or sectarian in nature, it becomes appropriate to view the entire historical and social context relating to the Creche and not merely its immediate physical context. As noted, the Creche not only

displays a central event in the origins of Christianity but also represents a central doctrine—the belief in the divinity of Jesus—which first and foremost separates Christians from other religions.

It is because of the fundamentally religious nature of the Creche that the sensibilities of non-Christian Americans and Christians who are offended by such use of a religious symbol must be recognized. Nor do we believe we are being hyper-sensitive or overly-fastidious in this regard.[3] On the contrary, it was protection against just such dangers, not only to Jews but to Christian and other religious sects as well, that led to the promulgation of the Establishment Clause itself.[4]

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3. In one of the few cases of which we are aware in which a federal court upheld the erection of a Creche by a governmental instrumentality, the Court acknowledged that "there are a number of citizens of the City and County of Denver who perceive the scene as an endorsement by the City of the Christian faith," but held that "the First Amendment does not require the prerogatives of government be limited by the sensibilities of its most sensitive or fastidious citizens." *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 526 F. Supp. 1310, 1315 (D. Col. 1981). We submit that the District Court in that case wholly misperceived the proper balance. The "sensibilities" involved in any Creche case are, at the minimum, those of members of all those faiths who do not subscribe to the central tenet of Christianity represented by the Creche, not to mention those Christians who object to the trivialization of such a tenet incumbent upon the use of a Creche by the State for non-religious (and usually commercial) purposes. Conversely, it is hard to see how, in being deprived of the "prerogative" to erect a Creche, a municipality is being deprived of any meaningful right or power whatever, since, on the municipality's own argument, there are numerous other "secular" symbols of Christmas available for its purposes. Further, such an argument assumes that a municipality has a right or power to engage in such activities, which *Amici* deny.

4. Thus, in attempting to elucidate the meaning of the Establishment Clause this Court, in *Everson* v. *Board of Education*, 330 U.S. 1, 8-9 (1947), offered the following observations regarding the background and environment of the period in which it was adopted:

(footnote continued on next page)

B. Governmental Sponsorship of a Creche Violates Basic Constitutional Principles of Governmental Neutrality Towards Religion.

In light of the history and purposes of the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion. . ."—a mandate made binding on the states by virtue of the Fourteenth Amendment[5]—this Court has not infrequently concluded that government must observe a "complete and unequivocal" separation between Church and State[6] and a wholesome "neutrality" toward various sects and denominations.[7] As this

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A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them. [footnote omitted].

5. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

6. *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952).

7. *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963). In *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970), this Court reiterated the basic purpose of the Religion Clauses of the First Amendment, which is "to insure that no

(footnote continued on next page)

Court stated only last year in *Larson* v. *Valente,* 456 U.S. 228, 246 (1982):

> Since *Everson* v. *Board of Education,* 330 U.S. 1 (1947), this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can "pass laws which aid one religion" or that "prefer one religion over another." *Id.,* at 15. This principle of denominational neutrality has been restated on many occasions. In *Zorach* v. *Clauson,* 343 U.S. 306 (1952), we said that "The government must be neutral when it comes to competition between sects." *Id.,* at 314. In *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), we stated unambiguously: "The First Amendment mandates governmental neutrality between religion and religion. . . . The State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute." *Id.,* at 104, citing *Abington School District* v. *Schempp,* 374 U.S. 203 (1963).

Given the religious heterogeneity of our country and the emergence of questions of constitutional dimension which might not have been foreseen by its Framers, the First Amendment must be given a "broad interpretation," *Everson* v. *Board of Education,* 330 U.S. 1, 15 (1947), and must be "responsive to the . . . highly charged nature of religious questions in contemporary society," *Abington School Dis-*

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religion be sponsored or favored, none commanded, and none inhibited" by the government. In that case, the Court found that a uniform property tax exemption for certain non-profit organizations, including religious organizations, did not amount to government sponsorship of religion. Rather, contrary to the government activities in the case at bar, the tax exemption complemented and reinforced the desired separation because it accomplished avoidance of a government demand that religion support the sovereign and avoidance of the excessive financial entanglement that would result from the collection and enforcement of such tax against religious organizations. *Id.* at 675-76.

trict v. *Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring).

From what has been already stated in Section A of this brief, it is patent that a Creche cannot be viewed other than as direct and unequivocal support for a doctrine that is central to Christianity. Accordingly, under any test, governmental erection of a Creche offends the Establishment Clause and must be struck down. This is true whether one applies the so-called "strict scrutiny" test of *Larson* v. *Valente, supra,* which the Court of Appeals applied in this case; the tripartite test of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), which the District Court applied in this case; or any other appropriate standard.

The "strict scrutiny" test is, we submit, the most appropriate one, since, under the doctrine of *Larson* v. *Valente,* it is to be applied to any state action that grants a "denominational preference." Under the "strict scrutiny" test, any such action is suspect and "must be invalidated unless it is justified by a compelling governmental interest, cf. *Widmar* v. *Vincent,* 454 U.S. 263, 269-270 (1981), and unless it is closely fitted to further that interest, *Murdock* v. *Pennsylvania,* 319 U.S. 105, 116-117 (1943)." *Id.* at 247.

In the instant case, petitioners do not seriously contend that erection of a Creche furthers some compelling governmental interest, let alone that it is closely fitted to furthering that interest; rather, their contention is that the "strict scrutiny" test is not applicable at all, because the action they took was not the erection of a sectarian Creche that favored one denomination, but the erection of a "primarily secular" Creche that favored no one denomination

more than another. Stated another way, petitioners claim that to apply the "strict scrutiny" standard is in effect to presuppose the very issue on which this case turns.

However, this argument advanced by petitioners is not persuasive. For not even petitioners claim that the Creche is, on its face and by itself, strictly secular in nature; rather, as quoted above, they concede that the Creche "retains some religious significance" (Petitioners' Brief at page 20) but contend that in this case this significance was overcome by the secular "context" in which the Creche was displayed. Thus, they claim that they were able to adapt that which on its face and by itself is a religious symbol to achieve a predominantly secular purpose (primarily, the commercial purpose of attracting shoppers). But, given the policy behind the "strict scrutiny" test, this would seem to be precisely the kind of situation in which the "strict scrutiny" test should be applied. For surely the central question regarding the use of the Creche—given petitioners' own rationale for its use—is whether some "compelling" governmental interest required the municipality to use the otherwise religious symbol, the Creche, to achieve its secular purpose. Why not use lights, or bells, or trees, or reindeer, or Santa Clauses, or any of the other more secular symbols of Christmas to achieve the municipality's secular purpose in this case? Why take a symbol that by itself is concededly religious in nature and try to adapt it, however successfully, to the secular purpose? There was no need, certainly no compelling need, for the municipality to thus flirt with violation of the Establishment Clause. Hence, a "strict scrutiny" test is wholly appropriate, and wholly dispositive, as the Court of Appeals found.

Even if a "strict scrutiny test were not applicable, the familiar tripartite test of *Lemon* v. *Kurtzman* is equally dispositive in establishing the unconstitutionality of the Creche, as the District Court found. Under *Lemon* v. *Kurtzman*, a challenged governmental activity violates the Establishment Clause unless it satisfies each of three requirements: first, the activity must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." *Lemon* v. *Kurtzman*, 403 U.S. at 612-13.

The District Court found that the municipality's erection of the Creche failed to satisfy *any* of these three tests, let alone all three. (525 F. Supp. at 1170-80). The Court of Appeals, while questioning the sufficiency of the District Court's analysis as to the third test, entirely agreed with its analysis respecting the first and second test—failure to meet either one of which was sufficient to invalidate the use of the Creche. (691 F.2d at 1033-34). We respectfully refer this Court to these analyses of the two courts below as demonstrating why erection of the Creche in this case fails to meet the tests of *Lemon* v. *Kurtzman;* but we also would add a few further observations.

***With respect to the first test*—that the challenged action must have a secular purpose—the lower courts found that the addition of the Creche did not in any way enhance the proclaimed economic, cultural and traditional purposes of the display. On the contrary, the District Court expressly found that the municipality's purpose was really "to endorse and promulgate religious belief by including a nativity scene in its display." (525 F. Supp. at 1173). But**

even if petitioners could somehow have shown that the erection of the Creche furthered one or more of the proclaimed secular purposes, this would not have been sufficient to satisfy the first test under *Lemon* v. *Kurtzman*. For even under the first test of *Lemon* v. *Kurtzman*, let alone under the "strict scrutiny" test, it is well-established that a government may not "employ religious means to reach a secular goal unless secular means are wholly unavailing." *Abington School District* v. *Schempp*, 374 U.S. at 294 (Brennan, J., concurring). Here, the municipality's proclaimed proposes for sponsoring the Christmas display would be amply satisfied without the inclusion of the Creche. *See American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (rejecting the Chamber of Commerce's alleged secular purposes of promoting tourism by erecting a large, lighted cross on state park property); *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980), *cert. denied*, 451 U.S. 987 (1981) (rejecting the City's alleged secular purpose of improving public relations by constructing a platform, including a cross, to be used by the Pope in conducting a religious service); *Stone* v. *Graham*, 449 U.S. 39 (1980) (rejecting the posting of the Ten Commandments on the wall of each public school classroom in Kentucky, despite the school district's assertion of a secular educational purpose).

With respect to the second test—that the principal or primary effect of the challenged action must be one that neither advances nor inhibits religion—both the District Court and the Court of Appeals expressly found that the primary effect of the erection of the Creche was to advance religion. (525 F. Supp. at 1176-78; 691 F.2d at 1035). We

would add only that, with respect to this aspect of the *Lemon* v. *Kurtzman* standard, all the petitioners' arguments about the importance of "context" really cut against them. For, as noted earlier, Christmas in America has a Janus-like quality: it can be regarded as either a secular or a religious holiday, depending upon the symbols and other "cues" associated with its celebration. By introducing into a display of otherwise secular or ambiguous symbols a symbol of overt and unambiguous religiosity in the form of the Creche, the municipality not only endorses a specific religious message but also conveys to the more ambiguous symbols in the display an aura of association with specific Christian beliefs that might otherwise go unnoticed. As the District Court noted, "[t]his aura of governmental approval is a subsidy as real and as valuable as financial assistance." (525 F. Supp. at 1178).

With respect to the third test—that the challenged action must not foster "an excessive governmental entanglement with religion"—the District Court inferred such an entanglement from the fact that the municipality's placement of the Creche in the display, when ultimately challenged by way of lawsuit, gave rise to great acrimony and divisiveness in the community; but the Court of Appeals declined to treat such divisiveness *per se* as a sufficient basis for inferring such a violation of the third test of the *Lemon* v. *Kurtzman* standard. Without entering into this debate, we submit that the simple fact of the government's endorsing a clear visual statement of a doctrine that is the central dividing line between Christian and non-Christian religions is sufficient "entanglement" to violate the third test.

This endorsement translates into very tangible entanglement. Public funds are being expended to erect, illuminate, maintain, disassemble and store the Creche. City employees or city paid contractors are paid for and spend time performing these tasks. The City reimburses the park's owner for all of the electricity used by the display. The very expenditure of public funds, no matter how small in amount, to finance a religious exercise "that only some of the people want and that violates the sensibility of others," breaches the separation of government from religion, entangles the State in religion, and violates the Establishment Clause. *Abington School District* **v.** *Schempp,* **374 U.S. at 229-30 (Douglas, J., concurring).**

Moreover, we would also note that the commercial use made of the Creche by the municipality in this case fosters a different kind of entanglement, to wit, the misappropriation by the State for its secular purposes of sacred symbols thought to be reserved for religious purposes. Thus, the primary use here made of the Creche—to attract shoppers —might well be viewed by many devout Christians as a profanation, detracting from the religious significance of the Nativity scene.[8] Such misuse of religion is as fully

8. In his dissent in the recent case *Marsh* v. *Chambers,* 51 U.S.L.W. 5162, 5168 n.16 (1983), Justice Brennan quotes a leading Methodist clergyman for this very point:

> "[Some propose] to reassert religious values by posting the Ten Commandments on every school-house wall, by erecting cardboard nativity shrines on every corner, by writing God's name on our money, and by using His Holy Name in political oratory. Is this not the ultimate in profanity? . . .
>
> "What is the result of all this display of holy things in public places? Does it make the market-place more holy? Does it improve people? Does it change their character or motives? On

(footnote continued on next page)

prohibited by the Establishment Clause as activity which intends to endorse religion. As this Court recognized in *Engle* v. *Vitale*, 370 U.S. 421, 431 (1962), where the Court held that a 22-word prayer used in daily classroom exercises in New York was a religious activity, the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion."

In our view then, the governmental endorsement of a Creche cannot pass constitutional muster under any one of the three prongs of the test of *Lemon* v. *Kurtzman*, let alone under any of the requirements of the "strict scrutiny" test of *Larson* v. *Valente*. Even if this were not true, however, we submit that government erection of a Creche would be in violation of the Establishment Clause. Government erection of a menorah or any other religious symbol would equally violate the Establishment Clause. For these "tests must not be viewed as setting the precise limits to the necessary constitutional inquiry but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger*, 421 U.S. 349, 359 (1975). In the end, the ultimate tests are still those policies of separation of Church and State and neutrality toward various denominations that underlie the Establishment Clause (and, for that matter, the Free Exercise Clause) of the Constitution. The Establishment Clause forbids every form of public aid or support for religion, whether aiding

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the contrary, the sacred symbols are thereby cheapened and degraded. The effect is often that of a television commercial on a captive audience—boredom and resentment." Kelley, D.M., Beyond Separation of Church and State, 5 J. Church and State 181, 190-91 (1963).

one religion, aiding all religions or preferring one religion over another. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 771 (1973); *Abington School District* v. *Schempp*, *supra* at 216; *Engel* v. *Vitale*, *supra* at 426; *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *Everson* v. *Board of Education*, *supra* at 15. In other words, the Establishment Clause was intended to erect " 'a wall of separation between Church and State.' " *Everson* v. *Board of Education*, *id.* at 16. It is this very separation which " 'has secured religious liberty from the invasion of the civil authority.' " *Id.* at 15.

No amount of lip-service paid to the supposedly secular nature of the "American Christmas" can disguise the fact that the Creche expresses in pictorial form the most central doctrines of the Christian religion. Governmental endorsement and support for such a presentation thereby violates in most cavalier fashion the letter, the spirit, and the purpose of the Establishment Clause.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

SAMUEL RABINOVE
THE AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, New York 10022
Attorney for Amici Curiae

Of Counsel:

JED S. RAKOFF
ELLEN B. COHN

ANDREA S. KLAUSNER
The American Jewish Committee